UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

XUEDAN WANG, on behalf of herself and all others similarly situated,

Plaintiffs,

v.

THE HEARST CORPORATION,

Defendant.

----------x

New York, N.Y.

12 Civ. 0793 (HB)

June 27, 2012
12:03 p.m.

Before:

HON. HAROLD BAER, JR.,

District Judge

APPEARANCES

OUTTEN & GOLDEN, LLP (NYC)
Attorneys for Plaintiffs
BY: RACHEL MEGAN BIEN
ADAM T. KLEIN

HEARST CORPORATION
Office of General Counsel
Attorneys for Defendant
BY: JONATHAN R. DONNELLAN
COURTENAY O'CONNOR
KRISTINA E. FINDIKYAN

(Case called)

THE COURT: Good morning, or good afternoon.

Anyway, this is a Hearst motion. Why don't I hear from you first.

MR. DONNELLAN: Thank you, your Honor.

We're here on our motion to strike the class allegations under both the FLSA and Rule 23 as well as plaintiffs' cross motion to conditionally certify the FLSA. I am going to address the FLSA and Rule 23 aspects of our motion separately.

With respect to the FLSA, the question is whether or not all interns at Hearst's 19 magazines and dozens of internship programs are similarly situated for purposes of first-stage conditional certification under the FLSA. The answer to that is no. And we know that because discovery has now confirmed the facts that were set forth in Hearst's motion, which show that the interns are not similarly situated on the question of whether or not they are employees, as that term is used in the FLSA.

Discovery has shown that there is no single Hearst magazine internship program; there are dozens of programs, there are 19 magazines and several different corporate departments, each of which is different.

THE COURT: Aren't the plaintiffs going to say or actually do say that all she needs to show for this conditional

certification is the potential opt-in plaintiffs were victims of a common policy? I think that's a lower hurdle than you seem to posit.

MR. DONNELLAN: Well, your Honor, the similarly-situated analysis focuses on necessarily whether or not a fair determination can be made based on representative evidence. The cases that they have cited and the cases that are discussed in the briefs dealing with conditional certification are in the misclassification category.

And in the misclassification cases, the similarly-situated analysis is tied into whether or not you can show on a class-wide basis whether or not all of the members of the class are exempt or not. Here you also have to be able to show that they are similarly situated with respect to the legal standard. The similarly-situated analysis is tied necessarily directly to the legal standard at issue. So what they need to be able to show, based on representative evidence, at this stage, at least, is that you can answer that question as to all based on one.

Now, here, because the interns differ so significantly in terms of the internship programs, in terms of what they do, in terms of the sorts of benefits that they got, that's not possible to do here. It's far different from the misclassification cases where you have a category of employee -- the ones where conditional certification is granted

all deal with facts where you have, say, an assistant manager of a store. Their job duties are defined. All of their responsibilities are defined. Those are the situations where conditional certification is granted.

On the other hand --

THE COURT: So, I mean, you say that. But the problem I have -- again, relying on the sort of low hurdle -- is that I gather, at least in Walling, the definition of the narrow exception to the broad sweep was the intent of the FLSA when it was passed, it really makes it reasonable to assume that even if they were all trainees participating, as the Court said, in a brief vocational training program, which is all true, allegedly, as you allege, that's offered by their employer, that that was enough. Isn't that what's happening here?

MR. DONNELLAN: Well, your Honor, it's not enough in this particular case because, as you see, the courts that have applied that Walling standard subsequently have all come around to say that you have to engage in an analysis of who is the primary beneficiary of the relationship. There is not a single court which has adopted the test that is proposed by plaintiffs here which say that it is simply enough to show that the interns, the trainees and so on engaged in productive work.

THE COURT: You wouldn't argue that what Hearst does, as the plaintiffs point out, is to capitalize on the alleged glamor that being an intern at Cosmopolitan brings and that's

pretty much universal in terms of all of the interns, right? So that at the very least -- and I suggest that, as I'm sure you suggest, that that's not very much in terms of commonality.

There is some of that. That's why they're there. And then you can go on to discuss, as you are biting your lip to get a chance to do, to say that in fact it really is a value only to the employee and that there is no value to the employer. But I think that's a hard jump to take.

I'm glad to listen to how you bridge the gap.

MR. DONNELLAN: Well, your Honor, that goes to the merits ultimately, right? When you go into a balancing of the benefits to the employer, the host company, and the balance of the benefits to the intern, which the case law, we have six circuit courts which have accepted that as the appropriate inquiry in terms of determining whether one is an employee.

Our point at this stage is that if that is the standard, that that standard cannot be employed on a class-wide basis, because the balance is going to be different with respect to different interns. They do different things. They are necessarily potentially going to provide different benefits to the company and potentially going to receive different benefits from the company under these different standards. It's not the sort of analysis that can be conducted on a representative basis.

THE COURT: Isn't that a problem for tomorrow, for

certification purposes?

MR. DONNELLAN: No, your Honor. I think it is a problem for today in terms of conditional certification, because in the conditional certification cases, even under the misclassification cases, where you are just trying to take a group that has the same title and trying to determine if they do all the same things so you can determine if they can all be classified as exempt or not, conditional certification is only granted in those cases where there is a sufficient showing of uniformity across the board about what everybody does.

THE COURT: That doesn't sound to me like Walling. I mean, Walling -- and I quote just a snippet and I don't suggest that this is the whole meaning, but it does talk at one point about how if a defendant gains an immediate advantage from a plaintiff's waiver, courts have found that the plaintiff is an employer for purposes of the FLSA, unquote.

It's hard for me to see how you can argue with that no matter how few clothes they picked up, whatever else they did.

MR. DONNELLAN: Well, in this particular case, it is far different from Walling because you had a group of interns who one thing that we can say is common about them and is true across the board is that they are all receiving academic credit from accredited academic institutions which dub this worthy in some ways. It is for a fixed duration, and they knew they were not getting paid.

THE COURT: I read all of that. I'm still not sure I understand what that does for either of you.

MR. DONNELLAN: Well, that goes to show that the commonalities in this case, your Honor, or the ways in which the interns are similarly situated do not advance plaintiffs' case at all in terms of proving liability.

In terms of proving liability, under Walling and under all of the circuit courts that have employed Walling and under the Archie case in this district, which is the only district court decision in the Second Circuit that we're aware of which has employed the analysis, it sets --

THE COURT: The only one in this century from what I can see. There may be some others.

MR. DONNELLAN: The benefit -- the balance of the benefit that one --

THE COURT: Actually, Archie is a '98 case. It is not even in this century. But that's OK.

MR. DONNELLAN: Well, the one that is in this century, your Honor, which we would point to which is the most factually analogous is the Solis case. The Solis case is very similar in that it deals with students who are in an educational setting. They are doing tasks at a sanitarium which is connected with a school, and the claim was made there by the Department of Labor that they should be deemed employees. And what the Court determined in that case was that there was indeed an advantage,

an economic benefit that was going to the school through the students' work, but on the other hand there was also significant benefits that were going to the students both tangible and intangible. And the Court engaged in a balancing of those benefits, and determined that the balance was in favor of the students.

And it looked in that case not just to the tangible benefits but also to intangible benefits such as work ethic, responsibility, and the like, finding that that was favorable and weighed against employee analysis.

Now, that case also collects a number of other cases from other circuits which have employed the same sort of balancing analysis -- the McLaughlin case in the Fourth Circuit, the Blair case from the Eighth Circuit. We also cite in our brief the Reich case from the Tenth Circuit, and the Strickland case from the Ninth Circuit.

THE COURT: Did you ever peek at the New Floridian -- the Donovan case in the Eleventh Circuit because that case doesn't seem to subscribe to your view? I mean, it really talks about how -- or concludes that the plaintiffs were employees because they performed productive work for the defendants despite what you are talking about, that they received certain advantages as well as what you laid out -- precisely what you laid out, actually -- job skills and the ability to create employment history.

MR. DONNELLAN: Well, the New Floridian case --

THE COURT: Not the same.

MR. DONNELLAN: Well, I'll tell you why it is not the same, your Honor. It is not the same because they conduct an economic benefits -- an economic realities analysis in that particular case. And in that case the workers of the New Floridian were adults, they weren't students. They were actually living there. And it was a long-term assignment. It was, in effect, a job where those workers, who were former patients in the mental institution, most of them, were economically dependent on New Floridian.

That is consistent with the Alamo case out of the Supreme Court, your Honor, and also with then Judge Sotomayor's decision in the Archie case. In all of those cases the court looked also to the economic realities of the situation to see whether or not the trainees in those cases, as they were dubbed, were actually economically dependent, whether or not they depended on them either for a paycheck, an extended pay, or for room and board, essentially.

THE COURT: You wouldn't say you have to earn money in order to qualify for your class, for FLSA treatment, would you?

MR. DONNELLAN: The Alamo case actually suggests that you do, your Honor. It says that you need to receive compensation. In that case it says --

THE COURT: You're saying they all got credit. That

is like money, right?

MR. DONNELLAN: They received credit from their academic institutions, which they paid for. Hearst provides the training; the academic institutions provides the credit.

THE COURT: So they have that money, whether it be credit or whether it be in your pocket. So that sort of, it seems to me, brings your argument to a draw. But --

MR. DONNELLAN: Well, potentially on the merits, your Honor, we have been focused so far mostly on whether or not at the end of the day Hearst will be able to establish whether or not these interns are employees or not. And the point that we're trying to make on this motion is, you know, this Court has a decision to make about what the governing standard is. And that standard, which we say is a balance-of-the-benefits test, which involves a look at who is the primary beneficiary and what the economic realities are, is different from the sort of test that has been proposed by plaintiffs here, which is simply if you can say that interns did productive work, that's enough, that's a liability and that is enough to show that they are similarly situated.

That very approach has been rejected by two courts. It has been rejected by the Tenth Circuit in the Reich case, where the court said that Walling was not an all-or-nothing approach and that productive work was not dispositive.

It was the same by the Fifth Circuit in Donovan v.

American Airlines, which said that Walling didn't rest on whether the work that was provided was economically beneficial to the company.

So that in and of itself can't be enough in order to establish liability or to establish that they are similarly situated.

What the Court needs to look at here, we suggest, is whether or not they are going to be able to -- and whether or not they have shown, even on a minimal basis at this point -- that this case will be able to be tried on a collective basis. And the cases where the courts have granted conditional certification, it usually involves uniform job descriptions at the outset. That's the way in which courts can say, sure, we can look at assistant managers at Duane Reade and we can say that they are all similarly situated because they get exactly the same training, have exactly the same responsibilities and exactly the same duties across the board; they are defined specifically.

The cases where conditional certification is not granted, such as the Myers case, is when the same sort of employees are not subject to the same sort of uniform definitions of what they do and what their responsibilities are in the outset.

THE COURT: But in large measure interns are pretty much doing uniform work even under your analysis. I mean, if

the magazine talks about airplanes, they obviously aren't going to be doing a lot of fashion design. But in terms -- unless you're saying that that does it, there is no longer a possibility of coming out the way the plaintiffs come out. If you are not saying at that, and let's for the sake of argument say you are not saying that, then it seems to me we don't really have any problem here. I mean, these people all worked for magazines, or whatever that uniform concept denotes, and they all did the kind of work that every intern does depending on what the rationale and what the goal was for these magazines. And if they were a fashion magazine, they did fashion work. And if they were Popular Mechanics, they did mechanical work.

I'm not sure -- I would just be interested in if you believe what I just said is wrong, that you couldn't have a class with that sort of spread, you ought to tell me.

MR. DONNELLAN: Your Honor, I don't think that you can have a class, because at the end of the day if you're going to have to balance the benefits, you are going to need to know much more about what they do. And the reason why we supported our motion with so many declarations was to give, at even just a top-down level look, the differences among them. These interns are not only just in different magazines with different focuses, but also the intern programs within each magazine, you have art, you have photography, you have editorial, you have

sales and marketing, which is a completely different side of the business, you have the fashion closets and the beauty closets, and all of these are different duties, different experiences for these interns. They are also subject to different supervisors and to different sorts of training --

THE COURT: My interns really work with clerks. In the last analysis, they get to see what they do. But you wouldn't say, if they all worked on habeas petitions and then in some case maybe what we needed was somebody to work on class actions, that wouldn't be a problem for you, right? They would still all be interns? Which is the point I'm trying to make, apparently not very well.

MR. DONNELLAN: There is a certain level of generality that's accepted, obviously, in the certification decisions. And if you were going just to job duties, that would be one thing.

I still think here that the differences are significant enough, as in the Myers case and the Mike case and the Diaz case that we cited where class certification was denied.

THE COURT: I'll like at Mike again.

MR. DONNELLAN: In those particular -- and then, also, I would also say to your Honor take a look back at the Zivali case, where Judge Rakoff decertified a class. In that case you were dealing with assistant store managers which at first

blush, because they were all the same across the board, were certified. And then when it was actually looked at what the facts were and the differences among what they did, he decertified the class.

THE COURT: Yes. But isn't that the next step?

MR. DONNELLAN: It would be the next step, your Honor, if at this stage you had some sort of a policy -- which is what we conducted discovery to see if it exists, and it doesn't -- which said you are a Hearst intern, you show up on day one, this is what you are going to do. It is defined. These are all of your duties. These are all of your tasks. This is your training, and this is you're going to be supervised. That would perhaps get you -- because you would have a uniform approach to the internship program, which they have challenged -- that might get you past the first step.

But there's another level of analysis that's required here because the test, or the legal standard for determining employee status is different from a misclassification case. You have to look at the benefit on the other side, and look at the differences there as well. It's not just what they did and what benefit they may have provided to the company, which in and of itself is insufficient to support any finding of liability, you also have to look at what sort of benefit was provided to them. And there each of their experiences are going to be different based on the kinds of work they did, the

amount of training they received, the amount of supervision. You could see it reflected even in the declarations that the plaintiff puts forward, the differences there, as well as the declarations that obviously that we put in, as well.

THE COURT: No doubt that there are certainly different types of benefits according, as I suggested earlier, according to the kind of work they are doing. I mean, it is a given.

MR. DONNELLAN: So if you do have to balance those in the end to determine whether or not they are an employee, you can't take one plaintiff, based on that plaintiffs' experience -- in this case, Wang, she was a full-time person, 50 hours a week, in a fashion closet, in a fashion magazine -- what her experience was in terms of what benefit she believes that she received and in terms of what contribution she made, that balance is going to be different from somebody who is writing stories, perhaps, and posting them online for Car & Driver or for another intern who works at The Food Network Magazine and was engaged in helping to make sales or learning how to do sales pitches on the business side of the magazine.

Each one of these experiences is very different, and it is going to result in a different balance. And because of that reason you are not going to be able to take this kind of a case and say give me the plaintiff, I'm going to look and see what she did, I'm going to make a determination about the level

of benefit that she received and that she provided, and then based on that determine if she is an employee and that can be applied equally across the board to all interns.

THE COURT: You said -- I don't want to put you on the spot, so you may know the answer, but would you say that if you were trying a case and you had as a class both waiters and headwaiters and busboys, that that would be a sufficient distinction so as to have to dismiss on a conditional -- right at this juncture in your case?

MR. DONNELLAN: I know, your Honor, that there is a case that's been cited in our papers which deals with wait staff in a restaurant, and I believe that was --

(Pause)

THE COURT: It is OK. I know the case.

MR. DONNELLAN: OK. The Shajan case, and I know that the Court said in that case that you don't have to live under a toad stool in order to know what people do in a restaurant and that this is pretty generic work. I think that you could say the same thing about the Hart v Rick's Cabaret case about the strippers. You know, there is --

THE COURT: More interesting.

MR. DONNELLAN: You don't have to live under a toad stool to know what they do for a living when they show up for work, too.

But the interns, they are covering every aspect of the

magazine business. These are each complex businesses, which somebody who is involved in the area of art and graphic design is going to be doing something completely different from somebody who is in the area of photography and learning about photography. And these interns are reflected even in the schools that they come from. There are more than 100 colleges that participate in the intern programs, some coming from very specific disciplines, such as the fashion Institute of Technology, others coming from photography and graphics arts programs, such as Parsons, and some come from business programs to learn about the sales and marketing aspects of the business.

THE COURT: I have people -- let's continue with the analogy in the restaurant. I have people in a program I run who have as their background essentially prison, and their ability to wash dishes is not enhanced or inhibited by the fact that their background was serving time. So why don't we add to the Shajan concept, although it may be added, sous chefs and dishwashers? Do you think that would make a difference in the analogy?

MR. DONNELLAN: I'm not sure that it would.

But, your Honor, we are not talking here just about the interns in a Good Housekeeping kitchen, which there is one, because what they do is entirely different from somebody who works in a fashion closet or, again, who writes for the magazine or who is doing photography for the magazine or

research. These are all wildly different tasks, and the level of benefit, again, that they are going to receive is going to be inherently different.

In the Solis case, it's interesting, they had a much smaller variety of different types of work that were being done by the students there, including working in the kitchen, including janitorial work, work which at a level you could say superficially this is all manual labor. So maybe you can deal with this altogether. But at the end of the day it was the balance in that case which came out against them being held employees was that they learned the dignity of manual labor. They learned responsibility. They learned a work ethic. So you can still balance all of these things and you need to balance all of these things.

And these sorts of benefits to the interns are going to be different based on what they are doing.

THE COURT: Does it make any difference that in the collective action lawsuit it is an opt-in operation so everybody that wants to play a role has to actually say so?

MR. DONNELLAN: Well, your Honor, under the conditional certification cases, there is still a hurdle that needs to be overcome here, otherwise there wouldn't any sort of first-stage analysis.

THE COURT: Well, does it make it a little lower hurdle?

MR. DONNELLAN: It is certainly a lower hurdle, but the lower hurdle is -- in the cases where it has been granted has been where you are able to tell on a corporate policy or practice basis that everyone is uniform with respect to the legal standard determining liability, because that ultimately goes to assist the court in trying this case on a representative basis and into the question of whether or not you can determine liability on representative evidence in a way that's just and fair and complies with -- comports with due process. And where you will have a balance-of-the-benefit standard, which needs to be applied, and the balance is going to be different because there is no uniformity here, then this sort of case can't get past the first step. It is not like the other cases where conditional certification have been granted.

THE COURT: Isn't the uniformity -- the real uniformity here that I suppose they can utilize, it is sort of averse to my way of thinking, but isn't the real common policy that indeed interns are denied any compensation?

MR. DONNELLAN: Yes, your Honor. That's one of the parts, which is that they are subject to the same pay provisions or to the same sort of treatment with respect to pay.

But as the District Court said in Myers -- this is Judge Cogan's July 24, '07 opinion. He was dealing with a Rule 23 class issue there, but he also referred back to the

conditional certification under the FLSA, which was denied. He said that, basing an argument just on that, the fact that you have somebody with the same title subject to the same pay provision, that that's superficial reasoning, which is not sufficient for certification purposes. You have to go beyond that, because here we need to know whether or not these class members, or putative class members, are similarly situated because they are subject to an unlawful policy.

Now, the policy that Hearst has of not paying interns and requiring that they are able to get school credit for their internship is not facially unlawful. What's needed to show that it is unlawful is to show that they are actually employees under the FLSA. And what's needed to show that they are actually employees under the FLSA is a balance of the benefits.

So to simply point to that policy about requiring credit for unpaid internships doesn't advance the ball at all in terms of telling you can you decide this case on a representative basis -- can you take one intern, take a look at the benefits they provided, the benefits they received, and determine for the entire class whether or not liability exists. It can't be done in this case.

(Pause)

Your Honor, the balance that needs to be conducted here is necessarily going to depend on what program the interns were in. There are different programs at different magazines

at different times subject to different management, different supervisors, and the interns were doing different things based on what category of internship they were in. They received, as is demonstrated through our submissions, different training from different people, both on a program-wide level and also on an individual level. They had different supervisors. And they certainly derived different benefits.

THE COURT: Well, I certainly hear you. It is just hard for me to picture how -- I mean, I hate to keep talking about these analogies, most of which are probably not very good anyway.

I mean, if you ran a hunting school and you were hunting for six or eight different animals so that you would use different instruments, like different guns or arrows or whatever, and you had to, just to make it more humorous, I guess you had a group of interns who were helping you with your bullets or your arrows or your bows, the fact that they had all kinds of different instruments and they did all kinds of different things -- I mean, they ran after the rabbits but not after the deer -- they would still be interns

MR. DONNELLAN: You got me there, your Honor. Maybe the interns with the crossbows, if they only learned about the crossbow, would be treated differently from the ones with the shotguns based on the amount of danger they exposed them to, I don't know.

But here what you're dealing with is a different kind of program where you're not mixing together a bunch of interns who are learning all of these disciplines together. They are segregated, and they are --

THE COURT: Well, all people might pick different parts of their forest.

MR. DONNELLAN: I think that might fall within the restaurant category.

But the magazines I think you can think of were almost like different schools, precisely because when you are talking about a hunting school that talks about different weapons, you would have a common administration and you would have a common set of protocols. Here we don't. That is precisely what discovery has shown. That's precisely what plaintiff was trying to discover during discovery, which is whether or not this was somehow administered on a corporate basis and whether or not there was corporate control that was exerted over this. There is not. Each one of these magazines is completely autonomous. They are very independent and they are very different. So you have to look at it almost like dozens of different schools as opposed to one school, which is the analogy there.

Maybe if it were a different kind of company or a different sort of internship program, you might have an argument here by analogy to the one that you just made, your

Honor, but not on the factual record that we have before us. It is simply not susceptible to being tried on a class-wide basis. We would have to have discovery of each one of these interns to determine what the benefit was that they derived, what sort of benefit they may have contributed, and also what sort of impediment it caused to the company.

If you are sinking a lot of time and training into these people -- you have to edit their work, you have to supervise them -- there is a real question about whether they provided any benefit at all at the end of the day. That is going to be different with respect to each one. And in order to make a determination of liability on employee status, we are entitled to take a look at each one of these interns and see where that balance turns out both in the discovery phases and a trial, your Honor, if it were to go forward that way.

On Rule 23, some of the arguments that have principally been made is that this is procedurally improper or premature. There is no bar to our bringing a motion to strike at the early stage. The Dukes case makes clear that Rule 23 certification is an exception to the rule.

And it's clear at this stage right now that it is not possible to resolve the central issue in this case, which is employee status, in one stroke, that there are not going to be common answers to any of the questions that have been raised here, and at the end of the day what's going to predominate is

an individual inquiry into the employee status of each individual intern.

THE COURT: And you think you have enough discovery now for me to make a decision with respect to each --

MR. DONNELLAN: Absolutely, your Honor. I think based on the factual record that we've submitted, you do have an ample basis to do precisely that.

THE COURT: All right. Let me hear from your adversary.

MS. BIEN: Good afternoon, your Honor.

THE COURT: Good afternoon.

MS. BIEN: I'll take the issues in the same order that counsel took them.

I think, first on the conditional certification motion, I would agree with your Honor that it is a very low standard. The standard that Myers seem to have agreed with, that had been the prevailing standard in this circuit for a very long time, was that the plaintiff at this stage only need make a showing -- a modest factual showing that she may be similarly situated to potential collective members and that she and potential collective members were subject to the same policy or plan that allegedly violated their rights.

And here the common policy or plan, as your Honor was discussing, was the determination at the corporate level to treat all interns as nonemployees and the determination at the

corporate level not to pay them any wages for the work that they did.

In addition to that common policy, which I don't think is disputed by the defendant, we've also put in declarations from five interns who worked at four different magazines. The declarations support their claim that they had common experiences. In fact, despite working in different magazines and despite having different tasks assigned to them, they all described doing primarily productive work that benefited Hearst and also having very little training opportunities or formal training provided to them.

THE COURT: Well, the problem I guess is if you look at the sum of all these -- I mean, I think the problem is that some of these things, like the fact that they are unpaid internships may be helpful, but here you have all kinds of other different things other than ones you've mentioned. I mean, Hearst says itself, I guess in its brief, students visit during one academic semester and different academic semesters and some magazines used them in the winter and some only in the summer, some at the spring break or the holidays, and they have no fixed starting date, or some don't, and some don't come by and some do come by on a regular basis. And the magazines tell the students that they're not going to get a job when this is all over. There is just a lot of other items that you didn't include in your potpourri, and I wonder whether if you take

them altogether you don't have to come out a little differently than you did.

MS. BIEN: Well, I would have two responses to that.

First, at this initial conditional certification phase, factual disputes in terms of the differences between the interns' experiences from one magazine to the other are not considered, are not ruled on. Those kinds of merits determinations are --

THE COURT: I understand that merit determinations are not part of this deal. What I'm trying to find out is how high this little burden is that you have to submit.

We all agree that the merits aren't counting and we all agree it's a low hurdle, but it is not a nonexistent hurdle.

MS. BIEN: Well, the hurdle is -- the hurdle basically looks at the evidence that the plaintiffs have submitted and does not take into account countervailing evidence that the defendants have submitted, not at this stage. Because the idea is to send out notice, see who joins, and at that stage the Court can later on, once the record is complete, make a determination as to whether those individuals who have actually joined are similarly situated to the individuals who are already in the case. If you --

THE COURT: All those circuit cases that your adversary cited, those seem not to go that way.

MS. BIEN: In fact, your Honor, the misclassifications -- the vast majority of misclassification cases involve situations where the plaintiffs make a modest factual showing that they are similarly situated or they may be similarly situated to other assistant store managers or others in their role, and the defendants always come forward with countervailing evidence at the initial certification stage showing that, well, in fact, the primary duties varied from location to location, or this manager had hire and fire power authority and this manager didn't, and courts uniformly refuse to consider that evidence at the initial certification stage and wait until the defendants have an opportunity later on to move to decertify the collective based on who has actually joined.

THE COURT: Yes. But I'm not going to let anybody pay for 1600 depositions, looking even over -- I mean, the time and money for getting to the second stage makes me feel -- and this may be illegal -- makes me feel reticent about going forward here, even if it may sound good because of all the thoughts you've expressed.

I mean, the discovery now, how long and how much do you think it will entail? I guess Hearst, too, has a role in making that decision.

What is your thought?

MS. BIEN: Well, your Honor, this is a pretty

straightforward case. I mean, it is all of the interns --

THE COURT: Mr. Donnellan says it is over now. He says you don't need any -- I lost my head. I mean, the discovery is over now.

MS. BIEN: The discovery hasn't even begun on our side. We haven't been able to --

THE COURT: He says there is enough to come to a decision now. That's really what I mean.

MS. BIEN: Well, they've put in their own evidence, but we haven't had any opportunity, except for the two human resources individuals that they put forward, to depose any of the other 34 people that they put forward. And I'm not saying, your Honor, that we would necessarily depose each and every one of them but we haven't been able to depose any of them. We haven't been able to interview potential class members about what their experiences were like, what their duties were, what their supervision was like, that what their training was like. We haven't been able to depose the supervisors --

THE COURT: I understand you but I think you might be missing what I'm saying, or you are not understanding what I'm saying.

I think this is a low hurdle, and you haven't given me the precise dimensions, but let's assume that it is low enough so you survive. I am not about to go forward with 50 or 100 or 1,000 interviews and depositions because you would like to talk

to every intern over the last six years that had some role at Car & Driver.

MS. BIEN: We don't believe that we need to speak to every intern. We don't believe we would have to speak to every supervisor.

Our belief is that representative evidence from a number of interns, a number of their supervisors will be able to satisfy our --

THE COURT: I don't know. What does that mean in terms of time and numbers?

MS. BIEN: I mean, in terms of a plan going forward --

THE COURT: A guesstimate. You are not under oath.

MS. BIEN: I mean, I think that the first thing that we would want to do is to have access to the class. So we would want their telephone numbers and their contact information so that we could conduct interviews and gather evidence that we could use to support a class certification motion.

The other -- you know, we would also propound discovery requests so that we could actually take discovery from the magazines about what their training policies were like, about the kinds of assignments that interns got. And we would also probably want to depose some of the individuals that they put forward as fact witnesses.

I think probably that discovery could be done in three

or four months, depending on how smoothly things go with, you know, working things out, but typically that's how long it would take in a case of this size.

THE COURT: Well, I want to read some of the cases that I haven't read. But the only possible way that you're going to prevail is if you give me a report, in more or less two pages, that tells me what kinds of discovery you are going to take, how long you're estimating it will take, and how many people you're bothering. So keep it in mind in case you survive the motion.

But go ahead. Let me not interrupt you, or I guess I have already. Tell me what else you think gives you the right to go forward.

MS. BIEN: Well, I think what I was saying earlier was that it is a low standard. I think that courts have routinely certified collectives based on a declaration from the named plaintiff and a declaration from some additional potential collective members and some evidence of some kind of uniform policy. And I think that we put forward much more than that.

And I think that the cases that we were talking about earlier, the misclassification cases involving FLSA exemptions, are really not dissimilar from this kind of case. This is a misclassification case as well. Just like in an independent contractor scenario where the employer has deemed the worker not to be an employee, here the employer has similarly deemed

the interns not to be employees, and those cases are routinely certified both as, you know, collective actions and ultimately as class actions.

THE COURT: Why is this a misclassification case?

MS. BIEN: Well, if you go back to the ultimate test, which is whether or not the interns are employees or not under the FLSA and the New York Labor Law, that is ultimately the determination. And so under the definition of what it is to employ, the question is whether Hearst suffered or permitted the work that the interns did.

And there are certain guideposts I think that can guide the Court's determination as to whether interns are employees or not. Counsel spoke about some of the cases that are more on point than others -- the Walling case in this circuit, the Archie case. You have the Department of Labor factors.

I think that counsel had argued that we had proposed a specific version of the tests that the Court will have to apply down the road when it determines the merits. And I think our position really is that at this point the Court doesn't have to determine what the exact contours of the standard is. What it can do is look at what the various factors that courts have looked at in determining whether or not trainees or interns are employees, and those will be the guideposts for the discovery to come as well as the guideposts for the Court ultimately in

determining the merits.

And our point is that under a balancing test that Hearst advocates, or a test that just looks at whether or not the employer derived an immediate advantage, under either of those standards at this point plaintiffs have put forth enough evidence to justify conditional certification.

With respect to the motion to strike the class allegations, the Rule 23 allegations, those kinds of motions to strike are especially discouraged in this circuit. And I think that Judge Pauley, in the Chenensky v. New York Life Insurance Company, really provides a very good explanation of why that is. And that is because in order to make a determination as to the propriety of class certification under the Rule 23 standard, the Court is going to have to make factual findings. And in the absence of a complete record, the Court can't make those findings.

At this point the Court can only make factual assumptions. And that's not the standard that the Second Circuit had in mind in the IPO case or in the Myers v. Hertz case when it said that there needs to be a factual record upon which the Court can make the determination.

I think class discovery -- Judge Pauley also talks about the value of class discovery in refining the class definition. Many of the arguments that Hearst makes has to do with the scope of the class, who the interns are that are in

the class definition, defined in the Complaint, and part of class discovery will hopefully enable us to determine whether or not that class definition should be the one that we actually move to certify down the road or whether it needs to be refined. And I think that the discovery period will offer us the opportunity to do that.

You know, another benefit of having a full record, and I think the emphasis of the Second Circuit has been, is that in the event that there is an appeal, the Second Circuit needs a record upon which to determine whether or not the Rule 23 findings made below should be, you know, affirmed or reversed.

So those are several reasons that Judge Pauley identified and other courts have identified for allowing class discovery to move forward and not adopting what Judge Pauley called the harsh remedy of striking the class allegations at the getgo.

I think that much of the evidence that has been put forward by Hearst, much of its arguments really come down to factual assumptions that have not been tested yet, that have not been cross-examined, and plaintiff has not had an opportunity to take her own discovery, and I think, you know, that's what she's asking the Court to allow her to do, you know, over the next few months.

THE COURT: Thank you, both.

If you want a minute or two to respond, Mr. Donnellan,

you can have it, but don't force yourself.

MR. DONNELLAN: Thank you, your Honor.

I think at the outset that we disagree wholeheartedly with plaintiffs' position that you don't need to determine the standard of liability now. It absolutely needs to be determined now because it is directly tied to the analysis of whether or not the class members are similarly situated.

The question is similarly situated as to what? It's similarly situated as to whether they are employees under the FLSA. And the Myers case makes clear the fact that when you're talking about an unlawful policy -- and I direct the Court to the Court's discussion on page 555 of the Second Circuit's decision. It says, in an FLSA exemption case, plaintiffs accomplish the goal of proving that they were victims of a common policy or plan to violate the law by making some showing that there were other employees who were similarly situated with respect to their job requirements and with regard to their pay provisions on which the criteria for many FLSA exemptions are based.

So they tailor their standard there to the exemption analysis. And it is a low threshold, as your Honor says, but it is not a nonexistent one, and it is one tailored to the exemption test.

Here how high is the burden? The burden is high enough so that the Court can determine that this case can be

tried on a representative basis to determine if these interns are employees.

The district court in -- the Second Circuit also cites from the District Court in Myers, and that is on page 544. And in quoting the collective action order where the District Court denied conditional certification, the reasoning is very similar to what we have here. In that case we're dealing with station managers for Hertz Corporation -- "Hertz," not Hearst -- Corporation.

It says, "The Court finds that plaintiff's motion suffers from a fatal flaw that further discovery cannot cure, because liability as to each putative plaintiff depends upon whether that plaintiff was correctly classified as exempt."

It goes on to say. That, to go on, the law there would require the court to make a fact-intensive inquiry into each potential plaintiff's employment situation. Any determination as to their right to overtime would require a highly individualized analysis as to whether the duties they performed fell within that exemption.

Here, similarly, you need to take a look and see whether or not they are correctly classed as nonemployees, and that is going to require an examination of each one of these interns that directly applies to the standard that's been applied under Walling.

Now, I would like to address Walling briefly, your

Honor, because it is really the seminal case in this regard. And as we've cited and discussed, the circuit courts that follow it have applied a balance of benefits and an economic realities test which is quite fact intensive.

But one of the things that's key about Walling, which a number of circuit courts have also pointed out, is that while there is a very broad definition or an undefined definition of "employee" under the FLSA, that Walling specifically limits it. And it's trying to make clear here that they do not want to foreclose opportunities for inexperienced workers to get training when it is for their own advantage.

And that's why in Walling you had a situation where the railroad company was doing this so that they would have a pool of workers. It also finds facts in the Walling decisions that these trainees did do work. And the Court, nonetheless, says that where you're without any express or implied compensation agreement, that the FLSA was not intended to stamp all persons employees who might work for their own advantage on the premises of another.

THE COURT: OK. This is not a reargument opportunity.

MR. DONNELLAN: OK, your Honor.

A final point, if I may, in terms of what sort of discovery would be necessary in order to determine whether or not this could be done on a class basis? You would almost have to do a full merits discovery on all of the different interns

in order to reach that.

THE COURT: Yeah, but that was not the thrust of my concern. My concern was that that is not going to happen, and what we need -- or it is up to you, I don't care -- is a couple of pages that limits that significantly, willingly, and with love and affection, and if they can't do it, they can't do it, but it is not a problem for you; you've done yours.

MR. DONNELLAN: Thank you, your Honor.

If they are going to make such a submission, we would appreciate the opportunity to respond.

THE COURT: Well, you'll certainly get a copy.

MR. DONNELLAN: Thank you.

THE COURT: Thanks, everybody. We'll be in touch in the not too distant future, and we'll either get going or we'll avoid getting going.

MS. BIEN: Thank you, your Honor.

MR. DONNELLAN: Thank you, your Honor.

- - -